

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

VERONICA ANTONIA JACKSON,

Defendant and Appellant.

B180087

(Los Angeles County
Super. Ct. No. BA134339)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Carol H. Rehm, Judge. Reversed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Veronica Jackson challenges the extension of her probationary term on

the grounds the trial court improperly found her in violation of probation and extended the duration of her probation beyond five years. We conclude the court was warranted in finding appellant in violation of her probation conditions, but improperly extended her probationary term beyond the statutory maximum.

BACKGROUND AND PROCEDURAL HISTORY

Appellant was charged with receiving aid by misrepresentation (Welf. & Inst. Code, § 10980, subd. (c)(2)) and four counts of perjury by false application for aid (Pen. Code, § 118.). In August 1996, she pled guilty to receiving aid by misrepresentation and was granted probation on various conditions, including payment of \$15,862 in restitution, at a minimum payment of \$50 per month.

In March 1999, appellant's probation was summarily revoked for desertion. In November 1999, appellant admitted violating her probation and waived her right to a revocation hearing. After the trial court found her in violation, it reinstated her probation and extended the period of probation to November 23, 2004.

In November 2004, the trial court again found appellant in violation of the conditions of her probation, revoked her probation for a second time, and extended the duration of probation until November 18, 2009. Appellant then filed the instant appeal.

DISCUSSION

Following the revocation, reinstatement and extension of appellant's probation in 1999, the probation department reported to the trial court in March 2000 that appellant had paid a total restitution of \$440, leaving a balance of \$17,058.20 to be paid as restitution, a restitution fine, and several service charges. Despite a prior request to revoke appellant's probation, the probation officer recommended continuing appellant on probation on the same terms and conditions. The court found appellant was not in violation and continued her probation on the same terms and conditions.

Sometime before August 4, 2004, appellant's probation officer asked the trial court to find appellant in violation of her probation conditions and extend the term of probation for an additional five years. This request was based on appellant's failure to complete her community service and pay her required restitution. The report stated appellant made 42 payments totaling \$4,080. The court directed the probation department to prepare a supplemental report and ordered appellant to submit to a financial evaluation.

A September 8, 2004 supplemental probation report stated appellant had made 43 restitution payments¹ totaling \$4,120, and still owed \$12,707.02 in restitution. The financial evaluator determined appellant's minimum monthly payment should be \$55. The report further indicated that appellant reported \$37,513 in income on her 2003 income tax return. The supplemental report recommended that the court find appellant in violation of her probation conditions and extend the term of probation for an additional five years. On September 8, 2004, the trial court ordered another supplemental probation report.

On October 21, 2004, appellant's probation officer reported to the trial court that appellant had paid an additional \$100, leaving a balance of \$12,607.02. The report further indicated appellant had not completed her community service. The probation officer again requested that the court find appellant in violation of her probation conditions and extend the term of probation for an additional five years. At the next court appearance, the court continued appellant's probation, but ordered her to "bring proof of payment and community service hours" to the next appearance.

On November 18, 2004, the parties stipulated that appellant owed a balance of \$8,713.50. Appellant informed the trial court she had completed her community service

¹ The report actually states "records reflect forty one (43) payments" Given the prior report of 42 payments, it is clear that, as between 41 and 43, 43 is the more correct figure.

and faxed proof of completion to her probation officer. She opposed an extension of her probation and requested that the court convert the monetary balance owed to a civil judgment. The court found appellant in violation of her probation, revoked probation, and reinstated it on the same terms and conditions, with a new expiration date of November 18, 2009.

Appellant contends the trial court erred in finding her in violation of her probation, because the evidence was insufficient to establish she violated the terms of her probation. She argues she paid \$8,713.70 over the course of eight years and three months, an average payment of \$88.18 per month. She argues, therefore, she complied with the court's order to pay \$50 or more per month and was not in violation of her probation conditions.

Penal Code section 1203.2, subdivision (a) authorizes a trial court to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation" The applicable standard of proof is a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal. 3d 437, 441.)

Appellant was required to pay \$15,862 in restitution, at a minimum payment of \$50 per month. By November 2004, she had not paid the full amount of the restitution. Appellant also admits in her reply brief she had not paid a minimum of \$50 per month, as she made no payments at all before her first revocation and reinstatement in November 1999. The record reveals appellant made 43 payments as of September 3, 2004. At that time, she had been on probation for at least 95 months. It is clear, therefore, appellant had not complied with the requirement of making monthly payments of any amount during at least 52 of the months spent on probation. Although appellant contends she made an additional three payments by the November 18, 2004 hearing, the undeniable fact is that she had not made monthly payments toward restitution. Examining appellant's payments made after the November 1999 reinstatement, appellant had not

made monthly payments, as at least 57 months had elapsed between reinstatement and September 2004, and she had made only 43 payments. Accordingly, ample evidence showed appellant was in violation of the conditions of her probation, in that she neither paid the full amount of the restitution order nor made the minimum required monthly payment each month she spent on probation. The trial court's conclusion was therefore supported by substantial evidence.

Appellant also contends the trial court improperly extended the duration of her probation because no change of circumstance occurred. A court may revoke or modify a term of probation at any time before expiration of the term. (Pen. Code, § 1203.3, subd. (a).) This power includes the power to extend the duration of the probationary term. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.) "A change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation." (*Ibid.*) However, "a change in circumstance could be found in a fact 'not available at the time of the original order,' namely, 'that setting the pay schedule consistent with defendant's ability to pay had resulted in defendant's inability to pay full restitution as contemplated within the original period of probation.'" (*Ibid.*, quoting the prior appellate opinion in the same case.) Appellant's failure to make payments every month and the inadequacy of the minimum payments to repay the entire restitution amount constituted changes in circumstances supporting an extension of probation.

Appellant further argues the trial court had no power to extend her probation an additional five years, as the court had already extended her probation for as long as was legally possible.

Penal Code section 1203.1, subdivision (a) provides that when a trial court suspends the imposition or execution of a sentence and grants probation, the term of that probationary any status may not exceed the maximum possible term of the sentence or five years if the maximum possible term is five years or less. Section 1203.2, subdivision (e) permits extension of the period of probation in excess of the original maximum length where the court finds the defendant in violation of probation, formally revokes probation

prior to the expiration of the probationary period, and sets aside the revocation. (*People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1266-1267.) However, a trial court may not revoke probation for failure to pay restitution unless it finds, based upon sufficient evidence, that the defendant willfully failed to pay and has the ability to pay. (Pen. Code, § 1203.2, subd. (a); *Bearden v. Georgia* (1983) 461 U.S. 660, 672.) If the court revokes probation without evidence and findings that the defendant has willfully refused to pay restitution even though he or she had the means to pay, the revocation violates due process. (*Id.* at pp. 668-669.) Therefore, the court may not extend the duration of a defendant's probation beyond the statutory maximum unless it finds the defendant was able to pay and willfully failed to make payments. (*People v. Medeiros*, *supra*, 25 Cal.App.4th at pp. 1266-1267.) "If these circumstances appear at the formal revocation hearing, the court is authorized to revoke probation and either order imprisonment or to set aside the revocation and reinstate probation for a new term exceeding the original maximum." (*Id.* at p. 1267.)

The trial court made no express findings regarding appellant's ability to pay or her willfulness in failing to make payments. Although the trial court is not required to make express findings of a defendant's ability to pay when setting the amount of restitution (see, e.g., *People v. Campbell* (1994) 21 Cal.App.4th 825, 831), the statutory and constitutional prohibitions against revoking probation without evidence and findings of an ability to pay and willful failure to pay necessarily require the court to create a record adequately reflecting its consideration of these issues. "For the statute to have any meaning and efficacy, in exercising its discretion the court must in some manner indicate it has considered the defendant probationer's willful failure to pay and ability to pay restitution and made a determination thereon. Although it need not recite any talismanic words or outline in detail all relevant factors it has considered in making its determination, the trial court must make apparent on the record, prior to exercising its discretion, that it has considered and weighed relevant factors in making the determinations required by the statute" (*People v. Self* (1991) 233 Cal.App.3d 414,

418.) Accordingly, prior to revoking probation for failure to pay restitution, the trial court must either make express findings or, at a minimum, indicate on the record that it considered whether the defendant was able to pay restitution and whether he or she willfully failed to pay restitution.

The record does not demonstrate that the trial court considered and weighed appellant's ability to pay the restitution in full or her willfulness in failing to pay the entire amount. The court instead stated appellant had not "honored the promises" to pay restitution that she made to avoid a prison sentence. It stated she "simply failed to pay it." In response to appellant's objection to the revocation, reinstatement and extension of her probation, the court noted that appellant had "not presented at this point any lack of ability to satisfy her financial obligation in this case."

Moreover, the trial court's findings must be based upon sufficient evidence. Because the probation officer determined appellant could pay \$55 per month, it would have taken her more than 288 months—24 years—to pay the entire amount of restitution, exclusive of costs and fines. At the rate of \$55 per month, it would have taken appellant an additional 158 months—13 years and 2 months—to pay the stipulated balance of \$8,713.50. Accordingly, the only evidence before the court regarding appellant's ability to pay the restitution strongly shows appellant did not have the ability to pay off the entire amount of her restitution before her probation expired in November 2004. In the absence of any express findings or supporting evidence showing appellant's ability to pay the restitution and willful failure to make payments, the court exceeded its jurisdiction when it extended appellant's probationary term for an additional five years.

Appellant's remaining restitution debt may be converted to, and enforced as, a civil judgment, as she expressly requested at the November 18, 2004 hearing.

(Pen. Code, § 1203, subd. (j).)

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.